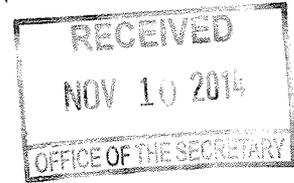


**UNITED STATES OF AMERICA**  
**Before the**  
**SECURITIES AND EXCHANGE COMMISSION**

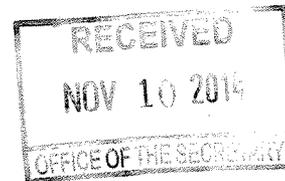
**ADMINISTRATIVE PROCEEDING**  
**File No. 3-15992**



**In the Matter of**

**MARC SHERMAN,**

**Respondent.**



**DIVISION OF ENFORCEMENT'S OPPOSITION TO**  
**RESPONDENT'S MOTION FOR MORE DEFINITE STATEMENT**

The Division of Enforcement ("Division") of the U.S. Securities and Exchange Commission ("Commission") respectfully submits this memorandum in opposition to Respondent's Motion for More Definite Statement (the "Motion").

**INTRODUCTION**

The Order Instituting Proceedings ("OIP") in this matter set forth in sufficient detail the facts giving rise to this proceeding, and thereby provided Respondent with legally sufficient notice of the allegations against him such that he can adequately prepare his defense. The specificity demanded by Respondent rises to the level of seeking full disclosure of the Division's evidence in advance of the hearing. Moreover, by failing to move for a more definite statement as part of his answer to the OIP, Respondent waived the relief he now seeks. For the reasons set forth below, the OIP complies with the Commission's Rules of Practice, and the Motion should be denied.

## PROCEDURAL HISTORY

On January 21, 2014, prior to the issuance of the OIP, Division staff held a telephonic conference with Respondent's counsel during which staff discussed, *inter alia*, the factual basis for the allegations in the OIP. The Division served Respondent with the OIP on August 4, 2014. Division staff produced the Divisions relevant, non-privileged files to Respondent's counsel on August 15, 2014. Respondent filed his answer on August 20, 2014, and did not move at that time for a more definite statement pursuant to section 220(d) of the Securities and Exchange Commission's Rules of Practice ("Rules of Practice"). On September 10, 2014, Administrative Law Judge Foelak held a prehearing conference and issued the Prehearing Order shortly thereafter.

## ARGUMENT

### I. Legal Standard for a Motion for More Definite Statement

Rule 200(b)(3) of the Rules of Practice requires that the OIP provide a "short and plain statement of the matters of fact and law to be considered and determined," and where, as here, the OIP requires an answer, it "shall set for the factual and legal basis alleged therefor in such detail as will permit a specific response thereto. . . ." Rules of Practice 200(b)(3).

Beyond the standard discussed above, the Rules of Practice do not require the Division to disclose all of its evidence before a hearing. Under settled Commission precedent:

a respondent is entitled to be sufficiently informed of the charges so that he or she may adequately prepare a defense, but a respondent is not entitled in advance of the hearing to disclosure of the evidence on which the Division intends to rely.

*In re Gupta*, A.P. No. 3-14279, May 2, 2011 (citing cases); *Matter of Wolfson, et al.*, 103 S.E.C. Docket 1153, 2012 WL 8702983, at \*1 (Mar. 28, 2012). See also *Matter of optionsXpress, Inc., et al.*, Rel. No. 710, S.E.C. Docket 419, 2012 WL 8704501, at \*2 (July 11, 2012) (denying

motion because the Division met burden to inform “respondents of the charges against them so they can prepare a defense;” and refusing to require Division to disclose evidence or theory of the case) (citations omitted). “[O]nce the factual basis of the allegation is sufficiently known by a respondent, any additional information is considered evidence to which a respondent is not entitled prior to hearing.” *Matter of Western Pacific Capital*, 102 S.E.C. Docket 3633, 2012 WL 8700141, at \*2 (Feb. 7, 2012).

## **II. Respondent has Waived His Right to a More Definite Statement**

As a threshold matter, Respondent has waived his right to seek a more definite statement. Rule of Practice 220(d) provides that a motion for more definite statement may be filed with an answer to the OIP. In this case, Respondent failed to move for a more definite statement in his answer to the OIP. Respondent has, therefore, waived his right to the relief sought in the Motion. *See Matter of Checkosky, et al.*, 52 S.E.C. Docket 450, 1988 WL 357005, at \*1 (Mar. 15, 1988) (stating that failure to timely move for a more definite statement may waive respondent’s objection rights, but denying relief on substantive grounds).

## **III. The Factual Bases for the Books and Records Allegations are Sufficiently Particular**

Contrary to Respondent’s assertions, the Division provided sufficient detail regarding its books-and-records allegations and the OIP complies with the Rules of Practice. Respondent seeks greater detail as to: (1) what books were falsified; (2) what the falsifications were; and (3) the dates of the falsifications. The OIP, the telephonic conference that preceded the issuance of the OIP, and the testimony transcripts and marked exhibits that have been produced to Respondent provide sufficient detail under the Rules of Practice.

The OIP specifically identified the categories of inventory and accounts receivable as the predicate for the Division’s books and records allegations. This offers Respondent sufficient

detail and notice regarding precisely what books were falsified. Indeed, the testimony transcripts, exhibits, and other documents produced to Respondent represent the evidence on which the Division relied in constructing its allegations, and include specific testimony as to the details Respondent seeks. In requiring additional detail, the Respondent is requesting more information than he is entitled to have before the hearing. *See, e.g., Matter of Conrad & Co., Inc., et al.*, 52 S.E.C. Docket 71, 1970 WL 11227, at \*1 - 2 (Apr. 8, 1970) (denying motion for more definite statement as to details of books and records violations where respondent sought details as to “time, place, and identity of persons, books and records. . .”).

Additionally, the false management representation letters sent to QSGI’s external auditors also provide a basis for the Division’s allegations. *See SEC v. Retail Pro, Inc.*, 673 F. Supp. 2d 1108, 1142 (S.D. Cal. 2009) (granting summary judgment to the Commission on its Section 13(b)(5) and Rule 13b2-1 and 13b2-2 claims against a CFO who had circumvented internal controls, falsified books and records and lied to the auditors by knowingly submitting false management representation letters); 15 U.S.C. § 78c(a)(37) (defining “records” to include “correspondence”). Simply put, Respondent’s Motion, which seeks detailed disclosure of all of the Division’s evidence “would be more appropriate as an attack following the hearing on the sufficiency of the Division’s proof.” *In re Gupta*, A.P. No. 3-14279 (May 2, 2011).

Respondent also asserts that additional detail is required to assess a potential statute of limitations defense. To the extent any of the conduct described in the OIP is outside the applicable statute of limitations, Respondent may argue the Division is entitled to a smaller penalty if liability is established. That conduct, however, remains relevant to assessing liability and other applicable remedies. *See Matter of Riordan*, 93 S.E.C. Docket 2569, 2008 WL 2884080, at \*21 (July 28, 2008) (stating that “the statute of limitations does not apply to

equitable remedies. . . .”); *Matter of Carley*, 92 S.E.C. Docket 1316, 2008 WL 268598, at \*21 (Jan. 31, 2008) (providing that “we may consider acts outside the limitations period as evidence of a respondent’s motive, intent, or knowledge in committing violations within the limitations period.”). The OIP is, therefore, sufficient under the Rules of Practice.

### CONCLUSION

Because Respondent’s motion fails to state a valid basis for the relief it seeks, Respondent’s motion should be denied.

Dated: November 10, 2014

Respectfully submitted,



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COUNSEL FOR  
DIVISION OF ENFORCEMENT

**CERTIFICATE OF SERVICE**

I hereby certify that true copies of the Division of Enforcement's Opposition to Respondent's Motion to Preclude Civil Monetary Penalties were served on the following on this 11th day of November, 2014, in the manner indicated below:

By Hand:

The Honorable Carol Fox Foelak  
Administrative Law Judge  
Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

By Electronic Mail:

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Victor Tabak